IN THE

Supreme Court of the United States

October Term, 1941
No. 924

ARSENAL BUILDING CORPORATION
AND SPEAR & CO. INC.,
Petitioners,

AGAINST

L. METCALFE WALLING, ADMINISTRATOR OF THE WAGE AND HOUR DIVISION, UNITED STATES DEPARTMENT OF LABOR,
Respondent.

REPLY BRIEF FOR PETITIONERS

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REPLY BRIEF FOR PETITIONERS.

I.

In the *Kirschbaum* case (1910), the Administrator lays much emphasis on the fact that the defendant furnished live steam of a particular quality for the operation of the machines of manufacturing tenants, and that without such steam the manufacturing machines would cease to function; that steam was also furnished to generate electricity not only to light the premises of the manufacturers but also to furnish motive power for parts of the machinery of tenants; and that the availability of this steam was a factor which led the manufacturers to locate their plants in the building (Administrator's brief, pp. 5-6, 16-7, 34-5); that two watchmen guarded deliveries and pick-up trucks

in the street and guarded the tenants' premises from loss by fire or theft or other sources; and that each morning the watchman turned on the heat required for the machinery of the manufacturers (Administrator's brief, p. 8). These facts do not appear in the *Arsenal* case.

In this same connection, it should be noted that in the *Arsenal* case the Circuit Court adopted an error in the Administrator's brief, which is still being repeated in its present brief, to the effect that the Arsenal Building furnished hot water necessary to the manufacturing operations (Administrator's Arsenal brief, p. 5). The Arsenal Building furnished water for the building purposes, and for the use of the tenants in their businesses, but there is no evidence that it furnished hot water for production.

Whatever may be our convictions as to the law which should be applied to these cases, it is entirely conceivable that in the application of the Fair Labor Standards Act, such differences might assume importance.

Let it also be stated that the defendants in the *Arsenal* case at no time have claimed that an employee must handle or work on goods or do preparatory work therefor before he can be found to be "*producing*" within the meaning of the Act. So far as the instant case is concerned the administrator in so arguing sets up a man of straw. For instance an operator of a crane in the factory would be producing within the meaning of the Act.

II.

The argument urged by the Administrator is that Congress intended by inference to take from the states to a large extent the field of management of real estate. As thus stated, this is peculiarly a case where the consequences and limits to be imposed by the interpretation and application of this statute must be considered and weighed and various questions must be answered before an intel-

ligent conclusion can be reached. How startling a proposal are we trying to lay on the shoulders of mere inference? What will be the effect of such a proposal on the distribution of sovereign powers? Taking into account the preponderant public opinion of our time, is it fairly inferable that Congress intended to have the Federal Government invade the field of the management of real estate? Any contention or argument which evades these questions—despite the repeated challenges of petitioners—by persistently ignoring the ultimate destination of any line of judicial reasoning which is being urged, cannot be regarded as constructive or helpful. Furthermore, we submit that lawyers who have devoted a substantial amount of time to the intensive study of this case owe it to this Court to at least suggest the significance of what this means and the possible point at which they would limit the extension of federal power under this Act. The decisions of the Circuit Courts in the *Kirschbaum* and *Arsenal* cases, and the Administrator's brief, fail pretty completely to meet this test. The petitioners have argued that if the Court goes so far as to sustain the Administrator's contention, there is no basis left for judicial demarcation in the future that will stop short of fantastic consequences. But that argument is left unanswered, or is referred to in the Circuit Court as mere "dialectical niceties." Is it "dialectical niceties" to look before you leap? If one is seeking to cross a stream without wetting one's feet, one does not necessarily jump to the nearest stone without taking into account the difficulties of the second jump.

Starting with the Administrator's premise that it is immaterial whether the immediate employer or employees are engaged in interstate commerce so long as they directly or indirectly contribute services or materials which are ultimately appropriated by some primary manufacturer engaged in producing goods for interstate commerce, we find ourselves unable to stop short of the grower, the miner,

the clothes presser or the restaurant keeper, who, while engaged in a strictly *local business*, either produce raw materials which ultimately find their way into the hands of the primary manufacturer, or serve or feed the employees of such a primary manufacturer. Furthermore, according to the Administrator's brief, if the cotton-grower or the restaurant keeper serve the interstate enterprise only in a slight degree, so long as it is not *de minimis* (Administrator's brief, p. 35), Congress is presumed to have intended to swallow them in the yawning gulf of Federal control. In this connection the Administrator seems to forget the *de minimis* doctrine by claiming in effect that the nature of the services of one of many employees may throw the whole establishment under the Act. Absurd as these cumulative conclusions may sound, we ask this Court to search the two opinions in the Circuit Courts, and the brief of the Administrator for any substantial help as to where the line of demarcation should be drawn short of all this, or any suggestion as to what enterprises would be excluded from the ambit of the Act if the Administrator's contentions were sustained. This very lack of any adequate suggestion along this line, either in the opinions of the Circuit Courts, or in the Administrator's brief, is at least some evidence that they either do not know the ultimates of the arguments they are urging, or that they know them and for some reason are disinclined to state them.

The pronunciamento issued by the Wage and Hour Division under date of April 20, 1942—which it will be remembered is but the first step of invasion of state rights by the Administrator under the principles laid down by the decisions of the Circuit Courts in these cases—is simply suggestive of the almost illimitable encroachment on certain types of states rights which will follow if the philosophy of the "house that Jack built" continues to be applied. We attach, as an appendix hereto, a copy of that pronunciamento.

Page 15 of the Administrator's brief calls attention to the fact that in defining the word "produced", Section 3.J of the Bill first contained the words "or in the making of tools and dies used in the production of such goods in any state," but that such words were ultimately displaced by the present wording of that section which closes with the phrase "or in any process of occupation necessary to the production thereof in any state." The Administrator argues that "the obvious purpose of this substitution was considerably to broaden the coverage of the Act by permitting the courts in the light of the facts of particular cases to determine which activities are necessary to production" (Administrator's brief, pp. 37-38). In other words, the Administrator contends that the only remaining test to the coverage of the Act as applied to production is whether the services or goods involved are "necessary" to the conduct of the work of the primary manufacturer who is engaged in producing for interstate commerce, and that the word "necessary", means anything which facilitates production. That contention, corroborated by the recent pronunciamento of the Administrator, bears out all that we have contended as to the extremes to which the arguments of the respondent carry us. Inevitably, there is no ambit or circumference to the coverage of this Act to which he can point, except where the service rendered, or the article produced, can be allocated exclusively to intrastate production and never ultimately reaches production for interstate commerce, and then only is it excluded if the employer is devoted exclusively to intrastate production or service. Even certified accountants, public stenographers and restaurants are in most cases covered.

Our contention as to the amendment of Section 3.J of the Bill—where the words "making of tools and dies used in the production" gave way to the words "necessary to

the production"—is that the intention was to eliminate any effort to include a manufacturer who merely sold to the primary producer, and to confine the application of the Act to those employees actually employed by the primary producer as a necessary part of his production of goods for interstate commerce.

III.

The Administrator's argument fails to give any weight to the major part of the definition of the word "produced" found in Section 3 J. If the closing words "process or occupation" necessary to production means everything contended for them by the Administrator, the major part of this entire section becomes surplusage and meaningless and the section might well be abbreviated:

> "Produced means any process or occupation necessary to production."

In fact the Administrator in his brief performs just that surgical operation on Section 3 J (Admr. Brief, p. 10).

If the section were so abbreviated, the petitioner would find it difficult to argue so cogently as to the real meaning of the intent of Congress. But Congress did not leave the courts in the dark on this point but specifically and explicitly enumerated the general character and quality of the acts which it intended to include within the definition of the word "produced". Then having been so explicit, and in order to fill in any gaps which might lie within the ambit of the definition as already set forth, Congress proceeded to use some general language which, in effect, meant "etc.". These closing words must be interpreted in the light of *ejusdem generis*. In other words, this closing phrase must be interpreted to mean something equivalent to

handling, working upon, or processing, goods, and this phrase must be limited to acts which are normally and directly connected with the production process within the particular producing enterprise. The closing generality was not adopted to enlarge the general area of application but merely to make doubly sure that everything within the area was covered.

IV.

The Administrator states in his brief that "Congress defined 'commerce' and 'produced' in the most sweeping terms". We submit that such a statement has no basis in fact. Congress defined the word "commerce" in a restrictive way, and in line with the decisions of this Court in respect to like definitions which theretofore had given a restrictive interpretation to the words "commerce" or "interstate commerce" (See our main brief, Point III).

As to the word "produced", it is clear that Congress did not intend to give it an application as broad as the National Labor Relations Act, because, in the course of the legislative history, the words "affecting commerce", as applied to production, were removed. The definition of the word "produced" in Section 3.J is specific and restrictive and relates everything to the physical act of producing whether it be the handling of the goods, or the performance of some other process or occupation of production. All services which do not involve the actual transporting or handling of the goods, or the performance of other activities immediately incident to the production, are excluded. Activities "affecting production" not being included and a specific enumeration of activities directly involved in production having been enumerated, it can hardly be said

that Congress has indulged "in the most sweeping terms" in using the word "produced".

Again, we submit that the Circuit Court erred and the judgment should be reversed.

Respectfully submitted,

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April 27, 1942.

APPENDIX.

Release of Wage and Hour Division dated April 20, 1942.

In the light of the Kirschbaum and Arsenal company decisions, it is the position of the Wage and Hour Division that the Act is applicable to employees engaged in producing fuel, power, or other goods or facilities for use or consumption entirely within the State by essential instrumentalities of interstate commerce, when such use or consumption aids or facilitates the interstate activities performed by means of such instrumentalities. Thus, for example, the Act is applicable to employees engaged in producing electric energy, steam, fuel or water for use within the State by railway terminals or depots, telephone exchanges, radio broadcasting stations, etc. The activities of such employees directly facilitate, aid, and contribute to interstate transportation, transmission, and communication, as a result of which such employees in our opinion are themselves properly to be deemed "engaged in commerce."

There are cases, moreover, where employees producing goods for use entirely with the State of production can be said to be engaged in a 'process or occupation necessary to the production' of other goods which move out of the State of production and are, therefore, subject to the Act. It is our opinion, for example, that the Act applies to employees engaged in producing fuel, power or water, which are used or consumed entirely within the State in the production of other goods for interstate commerce, and in accordance with this principle, the Act is applicable typically to employees engaged in producing power or water, all of which is locally consumed, but some of which is sold to local manufacturers and consumed by them within the State in the production of other goods for interstate commerce.